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In the Supreme Court of the United States

OCTOBER TERM, 1974

CLIFFORD T. GREEN, VALERIANO SUAREZ, and HENRY FORT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Reasons for Granting the Writ 5

I. There Is A Conflict Among The Circuits On The Applicability Of Title 21, United States Code, Section 841(a) 5

II. The Reasoning Of The District Columbia Circuit In *Moore* Is Superior To The Seventh Circuit's Reasoning As Applied To The Facts Of The Instant Case 6

III. The Court Of Appeals Erred In Treating The Pharmacist Defendant In Exactly The Same Manner As The Physician Defendant 7

IV. The Regulation Upon Which The Indictment Was Based Invalidly Expanded The Range Of Proscribed Activities Of 21 U.S.C. 841(a)(1) 9

V. Regardless Of The Liability Of The Physician Or Pharmacist, The Evidence Was Insufficient To Convict Henry Fort 10

Appendix A—Opinion of the United States Court of Appeals for the Seventh Circuit .....App. 1

Appendix B—Judgment Order entered on February 27, 1975 .....App. 26

AUTHORITIES CITED

Cases

PAGE

United States v. Downen, 496 F.2d 314 (10th Cir. 1974) 13

United States v. Moore, 505 F.2d 426 (D.C. Cir. 1974), *cert. granted*, 43 U.S.L.W. 3445 (February 18, 1975) 5

21 C.F.R., Sec. 306.04(a) 5, 10

21 U.S.C., Sec. 802(20) 8, 9

21 U.S.C., Sec. 821 10

21 U.S.C., Sec. 822 8

21 U.S.C., Sec. 822(c)(1) 8

21 U.S.C., Sec. 823(f) 8

21 U.S.C., Sec. 829 9

21 U.S.C., Sec. 841 ..... 6, 7, 8

21 U.S.C., Sec. 841(a) 5, 9

21 U.S.C., Sec. 841(a)(1) 9, 10, 13

21 U.S.C., Sec. 841(a)(2) 9

21 U.S.C., Secs. 842 and 843 ..... 6, 7, 8

21 U.S.C., Sec. 871(b) 10

28 U.S.C., Sec. 1254(1) 5

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Clifford T. Green, Valeriano Suarez and Henry G. Fort, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on February 27, 1975, affirming the Judgment of conviction previously entered in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The judgment of the District Court is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported. It is reproduced as an Appendix to the Petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on February 27, 1975. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a physician, who is duly registered under the Controlled Substances Act, is liable to the penalty provisions of Title 21, United States Code, Section 841.

2. Whether a pharmacist, acting as agent of a duly registered pharmacy, can be liable for the penalty provisions of 21 U.S.C. 841 if he dispenses controlled substances sold within his regular course of business at the pharmacy.

3. Whether Title 21, Code of Federal Regulations, Section 306.04(a), invalidly expands the scope of coverage of Title 21, United States Code, Section 841(a)(1).

4. Whether the evidence was sufficient to convict defendant Fort of conspiracy solely on the theory that the accused had knowledge that illegal activities were occurring in his building.

STATEMENT OF THE CASE

In March, 1973, Dr. Valeriano Suarez, Dr. James McClure, Clifford T. Green, and Henry G. Fort, were indicted for conspiracy to violate Title 21, United States Code, Section 841(a)(1), in violation of Title 21, United States Code, Section 846. There were also a number of substantive counts charging Suarez, McClure and Green with individual violations of 21 U.S.C. 841(a)(1). This indictment was dismissed on the government's own motion while under attack for insufficiency.

A superseding indictment was returned in June, 1973, which was virtually identical to the March indictment with the addition of violations of Title 21, Code of Federal Regulations, Section 306.04(a) being charged in conjunction with the violations of 21 U.S.C. 841(a)(1).

The facts which led to the indictment were that Dr. Suarez ran a medical clinic in a building owned by defendant Fort. Defendant Green was a pharmacist who, along with Fort, owned a pharmacy on the same floor of the building as Dr. Suarez's clinic. Dr. McClure worked part-time at the clinic.

Both doctors, the pharmacy and the pharmacists had all federal and state registrations and certifications to dispense controlled substances required by law.

The two doctors were charged with issuing prescriptions for controlled substances outside of the course of their professional practices and without legitimate medical purposes. Green was charged with filling these prescriptions with knowledge of their nature. Fort was charged with the others with conspiracy to dispense controlled substances in violation of 21 U.S.C. 841(a)(1) and 21 C.F.R. 306.04(a).

After a trial by jury, Dr. Suarez was found guilty of conspiracy, seventeen substantive counts, and not guilty of one count. Clifford Green was found guilty of conspiracy and ten substantive counts, and Henry Fort was found guilty of conspiracy. Dr. McClure was found not guilty of the charges against him. Dr. Suarez was sentenced to five years imprisonment, Clifford Green to three years, and Henry Fort to one year.

The convictions were affirmed by the Court of Appeals for the Seventh Circuit on February 27, 1975. No Petition for Rehearing was filed.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS ON THE APPLICABILITY OF TITLE 21, UNITED STATES CODE, SECTION 841(a).

In affirming the convictions of appellants Suarez and Green, the Court of Appeals for the Seventh Circuit expressly declined to follow the majority holding of the Court of Appeals for the District of Columbia Circuit in the case of *United States* v. *Moore*, 505 F.2d 426 (D.C. Cir. 1974), *cert. granted*, 43 U.S.L.W. 3445 (February 18, 1975). Thus, there is a conflict between two courts of appeals on decisions which were rendered on the same matter; the case then falls squarely within United States Supreme Court Rule 19(1)(b), 28 United States Code.

That the decisions were rendered on the same matter is undeniable. The facts in the instant case and the facts in *Moore* are almost identical. Defendants Moore and Suarez were both doctors who practiced in poverty-ridden and crime-infested urban neighborhoods. Both had massive patient loads of which a sizable portion was made up of self-proclaimed narcotics addicts. Both doctors prescribed large amounts of controlled substances to their patients. Each doctor defended his actions as being treatment for addiction.

Both doctors were convicted of violating Title 21, United States Code, Section 841(a), and Title 21, Code of Federal Regulations, Section 306.04(a).

On appeal each doctor argued that the section of the Controlled Substances Act under which he was convicted was not applicable to physicians registered to dispense controlled substances. Dr. Moore's conviction was reversed in the D.C. Circuit; Dr. Suarez's conviction was affirmed in the Seventh Circuit.

II.

THE REASONING OF THE DISTRICT OF COLUMBIA CIRCUIT IN MOORE IS SUPERIOR TO THE SEVENTH CIRCUIT'S REASONING AS APPLIED TO THE FACTS OF THE INSTANT CASE.

The split among the circuits on virtually identical facts and legal issues needs resolution. As applied to these facts, the Court in *Moore* presented reasoning and research which is far more persuasive and impressive than that which is found in the opinion in the instant case.

Chief Judge Bazelon's opinion in *Moore* was based on a thorough search of the legislative history of the relevant portions of the Controlled Substances Act, 505 F.2d at 429-430. By distinguishing the present act from the provisions of its predecessor, the Harrison Narcotics Act of 1914, the majority opinion in *Moore* exhibited an insightful and internally consistent determination of the intent of Congress in passing the registration provisions and related penalties of the Act. The conclusion reached in *Moore* was that Congress intended errant registrants to be covered by the penalty provisions of 21 U.S.C., Sections 842 and 843, while Section 841 would be applicable only to those persons who dealt in controlled substances outside of the regulated channels of distribution. Thus, a physician who writes prescriptions for drugs in a manner other than that permitted by his registration will be sub-

ject only to the penalties of Sections 842 and 843 which serve to back up the close and complete administrative regulation of registrants.

In contrast to the well-reasoned majority opinion in *Moore,* the court in the instant case began declaring that a registrant who does what was done here ". . . should be treated like . . . any street-corner pill-pusher". (slip opinion, p. 9). The court then proceeded to make the law treat registrants the way it felt that they should be treated. Unfortunately the court accomplished this feat by arbitrarily determining that Congress did not mean to do what it did when it enacted specific penalty provision for registrants under the Act. Rather, the court said, in effect, that Section 841 must be applied liberally to encompass those authorized by law to distribute controlled substances as well as those not so authorized. This in spite of the fact that registrants were given their own set of penalties under the Act. Thus, the Seventh Circuit Court of Appeals chose to ignore the legislative history and interpreted the law on the basis of what it presumed Congress must have wanted.

III.

THE COURT OF APPEALS ERRED IN TREATING THE PHARMACIST DEFENDANT IN EXACTLY THE SAME MANNER AS THE PHYSICIAN DEFENDANT.

Defendant Green, the pharmacist who filled the bulk of Dr. Suarez's prescriptions, was mentioned specifically only once by the Court of Appeals. That referral came in a footnote which, in effect, held that pharmacists are to be treated in exactly the same manner as physicians in reference to violations of the Controlled Substances Act. (slip opinion, note 12, page 8).

However, there are substantial differences between the status of a doctor and that of a druggist which will not

permit a blanket treatment of the two professions in this matter. The Court of Appeals was wrong in its assumption that Title 21, United States Code, Section 822, requires pharmacists to register in order to distribute controlled substances. Rather, as was brought out at trial, it is the pharmacy which must be registered, 21 U.S.C. 823(f), and the pharmacist need not be, 21 U.S.C. 822(c)(1).

Thus, the holding in *Moore* is not directly applicable to pharmacists. But this also means that the penalty provisions of 21 U.S.C. 842 and 843 are not applicable to druggists and, as held by the court, Section 841 is applicable.

The trouble with this conclusion is that the terms of Section 841 exempt pharmacists when read in conjunction with Sections 822 (c)(1) and 823(f). Also relevant is the definitional section, 21 U.S.C. 802(20), which includes "pharmacy" but not "pharmacist" under the heading "practitioner".

It is undisputed that a registered pharmacy may dispense controlled substances pursuant to valid prescriptions. It is also undisputed that each of Dr. Suarez's prescriptions was valid on its face. Thus, the issue in regard to pharmacists concerns the extent to which a pharmacist must go beyond the prescription and delve into the motives of the dispensing physician.

If a pharmacist has reason to believe that a prescription, valid on its face, was issued for other than a legitimate medical purpose, what is he required to do in order to avoid criminal liability? The statute offers no guide, nor do the federal regulations. Thus, the defendant-pharmacist was authorized by the subchapter to dispense controlled substances; no place in the subchapter is that authorization

limited. Section 802(20) refers to "course of professional practice," but does not refer to pharmacists.

This can lead to one of two conclusions: 1) any time a pharmacist fills a prescription for a controlled substance he is violating Section 841(a) or 2) a pharmacist cannot violate the section so long as there is a facially valid prescription so that there is no violation of 21 U.S.C. 829.

IV.

THE REGULATION UPON WHICH THE INDICTMENT WAS BASED INVALIDLY EXPANDED THE RANGE OF PROSCRIBED ACTIVITIES OF 21 U.S.C. 841(a)(1).

The indictments against all three defendants charged violations of Title 21, United States Code, Section 841(a)(1) and Title 21, Code of Federal Regulations, Section 306.04(a). The regulation was promulgated by the Attorney General to define and clarify the proscriptions of the statute.

However, this particular regulation went far beyond that. While that statutory language spoke only in terms of dispensing drugs "in the course of professional practice", 21 U.S.C. 802(20), the regulation defines valid dispensation as "for a legitimate medical purpose". While the statutory language only requires that the doctor be acting as a doctor in dispensing the prescriptions, the regulatory language requires that the prescriptions be for drugs which are accepted medically for treatment of the particular ailment. Thus, where, as in this case, expert medical testimony was presented by the prosecution on the value of certain drugs as treatment for narcotics addiction, the issue being resolved by this testimony is "legitimate medical purpose", not whether or not the prescriptions were issued "in the course of professional practice". This

can lead, as it did here in great degree, to a doctor who prescribes unorthodox medications in the belief that they will be effective being convicted of unlawful dispensing of controlled substances.

Further, in reference to petitioner Green, it is only in 21 C.F.R. 306.04(a) that the duty of the pharmacist is declared. Thus it was the Attorney General and not Congress who determined that the non-registered pharmacist has the same duties as the registered physician and is subject to exactly the same sanctions. The authorizations of 21 U.S.C. 821 and 871(b) do not give the Attorney General the power to determine what is and what is not criminal conduct.

As a result of the inclusion of the regulation in the indictment, the petitioners may very well stand convicted of a crime which was never created by Congress.

V.

REGARDLESS OF THE LIABILITY OF THE PHYSICIAN OR PHARMACIST, THE EVIDENCE WAS INSUFFICIENT TO CONVICT HENRY FORT.

There was no direct evidence that Petitioner, Henry Fort, agreed with anyone to violate Title 21, United States Code, Section 841(a)(1). While it is not disputed that a defendant can be convicted of conspiracy based wholly on circumstantial evidence, the evidence presented against Henry Fort falls far short of that required to find him a member of a conspiracy beyond a reasonable doubt.

The evidence against this petitioner can be summarized as follows: He was the owner of the building in which the medical center and pharmacy were located. Petitioner hired guards to patrol the building. He owned half the stock in the pharmacy and was one of its officers. He approved of and encouraged the use of a private phone line

between the clinic and the pharmacy and applied for registration as an apprentice pharmacist.

On the other hand, Henry Fort never issued a prescription, nor did he ever fill a prescription. The closest he ever got to a controlled substance was manually taking tablets out of a large bottle and counting them into smaller bottles.

This evidence is far more consistent with the acts of a businessman and property owner concerned with getting the maximum lawful return from his investments than is it of a member of a conspiracy to dispense drugs illegally.

As the owner of a building in a disadvantaged area it is certainly reasonable to hire guards to protect the property. It is more than reasonable in view of the fact that the medical center in the building was often congested with patients whose conduct was far from exemplary. Indeed, it would have been lax of petitioner had he not hired a guard for the building.

One of the guards was stationed permanently on the eighth floor of the building. This assignment is reasonable since the medical center, the source of most activity and potential for misconduct, was located on that floor.

Two of the duties of the eighth floor guard were to check persons entering the pharmacy for prescriptions and to report to the pharmacist on the number of persons waiting for treatment at the medical center. Since Fort was wearing two hats at this time—building owner and pharmacy owner—charging the guard with these duties can imply no nefarious purpose. The Afro-American Pharmacy was a "prescription" pharmacy, thus patrons would be expected to have prescriptions when entering. A guard to turn away persons without prescriptions would serve to reduce congestion on an already crowded floor.

Further, a periodic check of the clinic's waiting room made sense because the pharmacy drew most of its patrons directly from the clinic. If the clinic was empty there was little reason for the pharmacy to remain open. Having the guard rather than the pharmacist go across the hall to make the checks was for the convenience of the latter.

The most damaging evidence against petitioner was the direct phone between the clinic and the pharmacy which he knew of and encouraged. There is nothing illegal about such activity. Since Fort asked legal advice from an attorney on this matter, it is apparent that he wanted to be sure that nothing done would be against the law. Once the phone line was installed, it is reasonable that the owner of the pharmacy would want to get the maximum use out of it in order to increase the revenue of the business.

Since Fort is neither a pharmacist nor a doctor, he could not be charged in any of the substantive counts as the indictment was drawn. And, since Dr. Suarez and Dr. McClure were writing the prescriptions and pharmacist Green was filling the prescriptions, it is imperative to ask the following question—what essential and otherwise missing ingredient was Fort contributing to the conspiracy? The answer to that question is—nothing. The Conspiracy as alleged by the Government, with or without the inclusion of petitioner, would run in exactly the same manner. Henry Fort could bring nothing to it.

Thus, taking all the evidence as a whole, the picture is one of a concerned businessman and property owner anxious to improve his financial position and that of the business in which he was a stockholder. Little was shown to indicate that petitioner had any knowledge of illegal events at the building and, if any crimes were committed

at the site, it appears that Henry Fort took all reasonable steps to prevent them.

The government's theory—that if Henry Fort knew what was going on he must have been involved in it—is legally insufficient. It is certainly the law that ". . . mere knowledge, approval or acquiescence in the object of the conspiracy, without an agreement to cooperate in achieving such object and purpose, does not make one a party to a conspiracy." *United States* v. *Downen,* 496 F.2d 314, 319 (10th Cir. 1974).

Of course, if the convictions of Dr. Suarez and Clifford Green are reversed, the conviction of Henry Fort must also be reversed. Since neither a registered physician or pharmacist in a registered pharmacy could violate 21 U.S.C. 841(a)(1) in the manner charged in the indictment, the "conspiracy" to violate that section could not have occurred since only Fort, the inactive conspirator, was legally capable of being guilty of the offense. Needless to say, a one man conspiracy cannot exist.

Wherefore, for the foregoing reasons, the Petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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